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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JOHN JONES, Defendant and Appellant.	D069649 (Super. Ct. No. RIF1301912)

APPEAL from a judgment of the Superior Court of Riverside County, Edward D. Webster, Judge. Affirmed.

Randall B. Bookout, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Daniel John Jones of the second degree murder of James Weatherby (Pen. Code, § 187, subd. (a))[1] and found true an allegation Jones personally discharged a firearm during the commission of the offense causing great bodily injury (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)). The jury also returned a guilty verdict on a charge that Jones assaulted Miles Conley, with enhancements for personally using a firearm causing great bodily injury. (§§ 245, subd. (b), 12022.5, subd. (a); 12022.7, subd. (a), 1192.7, subd. (c)(8).) In addition, the jury found Jones guilty of two counts of assault on a person with a firearm (§ 243, subd. (e)(1)) and misdemeanor domestic battery (§ 245, subd. (e)). Prior to trial, Jones pleaded guilty to possession of an assault weapon and a short-barreled shotgun. (§§ 30605, subd. (a), 33215.) The trial court sentenced Jones to 40 years to life for murder, and to a determinate term of 27 years, 4 months on the other counts, to run consecutively.

On appeal, Jones implicitly challenges only his conviction for the second degree murder of James Weatherby.[2] Jones contends the trial court erred in not allowing his claim of self-defense to go to the jury. He argues he was denied due process of law when the trial court instructed the jury it could not consider voluntary intoxication in evaluating

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 At closing argument, trial counsel acknowledged Jones was guilty of assault with a deadly weapon on Conley and two other individuals, and of possession of an assault weapon.

his claim of unreasonable self-defense.[3] Jones contends the circumstances of his silence after his wife asked him why the police were telling her that he had killed someone did not warrant an adoptive admission instruction, and violated his right to remain silent under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*). Finally, Jones argues the trial court committed prejudicial error in refusing to redact the word "faggot" from a police recording that was admitted in evidence.

We conclude that the trial court erred by precluding the jury from considering evidence of Jones's voluntary intoxication in deciding whether he had the state of mind required for imperfect self-defense. We further conclude that the error was harmless. With respect to the remaining claims on appeal, we find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Overview

On March 13, Jones was visiting his girlfriend, Karon Brown, at her apartment. He had recently lost his job as a certified public accountant as a result of alcohol abuse. At Brown's apartment, Jones began drinking vodka at approximately 11:00 a.m., ultimately drinking a bottle and a half by himself during the day. Jones was also taking prescribed medication for depression and anxiety. With no apparent reason, Jones hit Brown in the face. Later, he shot and wounded her next door neighbor, Miles Conley, in the leg. Jones then shot and killed a downstairs neighbor, James Weatherby. Jones fled,

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[3] Unreasonable self-defense is also called imperfect self-defense. (*People v. Elmore* (2014) 59 Cal.4th 121, 129 (*Elmore*).)

driving erratically on the freeway. He had a minor traffic accident. When two motorists stopped to help him, Jones pointed guns at them, and fired a gun at least once, hitting one of the motorists' vehicles.

The People charged Jones with murder in the first degree of James Weatherby (Count 1); assault with a firearm on Miles Conley, Bryan Quan and William Dickey (Counts 2, 3 and 4); robbery (Count 5);[4] possession of an assault weapon and a short-barreled shotgun (Counts 6 and 7); and domestic battery (Count 8). The People alleged Jones intentionally discharged a firearm causing great bodily injury in committing Counts 1 and 2, and personally used a firearm in committing Counts 3, 4 and 5.

The Prosecution Case

Brown testified she lived with her three daughters in the Amber Crest Apartments in Riverside. Brown had dated Jones for two and a half years. Jones was never violent in any way. She knew he had a drinking problem and was taking medication for anxiety.

On March 13, Jones was at her apartment. He started drinking vodka out of a big bottle before lunch and became intoxicated. At some point, he put his hands on her neck. Brown could breathe but was frightened. She told Jones to go home. Jones said, "I should punch you." He then hit Brown on her face, causing a contusion on her cheek.

Brown heard Jones say, "Where's my guns?" Brown ran downstairs, forgetting her keys. Jones followed her, locking the apartment door. Jones telephoned a locksmith. Jones and Brown waited in Jones's Mercedes until the locksmith arrived. There was a

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4 The jury acquitted Jones of Count 5 (robbery). In the interests of judicial economy and brevity, we do not discuss the facts underlying this count.

gun on the floorboard of the car. Brown asked Jones to put the gun away, which he did. He showed two other guns to her.

When the locksmith arrived, Jones and Brown returned to Brown's apartment. Her daughters came home. Brown said Jones was acting very strangely, just sitting and staring. Jones had consumed a bottle and a half of vodka. The children asked Jones for money for ice cream, which he gave to them. At approximately 5:00 or 6:00 p.m., Jones stopped drinking.

Brown testified that Miles Conley, her next door neighbor, arrived when she and Jones were on the front balcony. Conley told her he saw her daughter jaywalking across a busy street. When Conley was speaking to Brown, Jones said to him, "Why are you talking to her? Are you fucking her?"

Brown testified she told Jones, "I don't even talk to that guy." She returned to her apartment. Brown saw Jones go downstairs to his car. He went to his trunk and the passenger side door. Brown stopped watching Jones because she thought he was leaving.

Brown heard a gunshot. She saw Jones walking down the stairs. He was walking normally. When he got to the bottom of the stairs, he did not enter the parking lot. Instead, he walked toward the apartment building. Brown told her children to go to their cousin's apartment. When Brown was leaving her apartment, she saw Jones get into his Mercedes and start the car.

Miles Conley testified he had lived at the Amber Crest Apartments for more than 18 years. He lived next door to Karon Brown. Conley had known Jim Weatherby, his

downstairs neighbor, for approximately two years. Conley said Weatherby was "half-blind."

In the afternoon on March 13, Conley left his apartment to do an errand. When he returned, Jones, Brown and the children were outside on the balcony. As Conley opened his door, Jones asked him if he was fucking his girlfriend. Conley told Jones he did not know his girlfriend. Jones smelled of alcohol.

Conley was in his bedroom when he heard a tapping at his window. When Conley went into his living room, Jones was standing in his apartment. Conley said, "Get the fuck out of my house." Jones was wearing an FBI hat and a Los Angeles Kings jersey. He flashed a badge at Conley and pulled out a semiautomatic gun from behind his back. Conley tried to grab the gun from Jones. Jones said, "I'll blow your fucking kneecap off." Jones shot Conley, hitting him above the knee. The bullet tore through tissue. Conley did not require surgery.

An upstairs neighbor testified she looked out her window after she heard the first gunshot. Less than 60 seconds later she saw a man standing in front of Weatherby's apartment. The man was standing very straight. He appeared to be very focused and was aiming a gun at Weatherby's front door. The man never tried to duck or lean over. Another witness testified he saw the defendant in front of Weatherby's apartment, holding a gun in both hands. He was pointing the gun straight out, with his arms extended. The defendant waited approximately five seconds and then fired the gun.

When Weatherby heard the gunshot that injured Conley, he telephoned 911. He gave dispatch his address and said there was a gunshot fired upstairs. The dispatcher

asked for the apartment number where the shot was fired. Weatherby said, "I can't tell you. I'm almost blind. I can't read the number from here. Um, I'm gonna walk over this way. . . . It was Apartment 60. There's a guy leaving right now. . . heavy set guy. I'm looking at him . . . he's got a black and white shirt on."

"Male voice: Hey, hey.

"Dispatch: Is he wearing pants or shorts?

"Weatherby: Ah, help me, help me, oh my God.

"Dispatch: Hello? Hello?

"Weatherby: I've been, sho, I've been, sho . . . ."

Weatherby died from a gunshot wound to the back. The bullet fractured his ninth back rib, hit the lower lobe of the right lung, lacerated the pericardial sac and perforated the right atrium of his heart. A neighbor discovered him lying face down inside his apartment and notified the police.

At approximately 8:00 p.m., Patrick Cain was approaching the University Avenue off-ramp on the 215 freeway. He saw three vehicles with emergency flashers on — a white minivan, a white sedan and a black sedan[5] — parked to the right of the shoulder. Cain saw a heavyset man who was wearing a Los Angeles Kings jersey. The man was holding two guns. He was pointing a gun at an Asian man. Cain exited the freeway and telephoned 911.

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5 The record shows that Jones was the driver of the black sedan, a Mercedes, Bryan Quan was driving the white sedan, and Michael Dickey was the driver of the white minivan. For convenience and clarity, we use the drivers' names while describing the evidence even though the witnesses did not know the others' names at the time.

Bryan Quan was driving on the freeway when a black Mercedes passed him at high speed, clipping a truck. The Mercedes started to exit at University Avenue but hit the sound barrier wall. Another driver, Michael Dickey, stopped his white van behind Quan's car. Quan approached Jones, who was sitting in his Mercedes, and asked him for his car keys. Jones appeared to be disoriented. There was a heavy smell of alcohol around him. Jones said he was a police officer and flashed a badge. Quan said, "That's fine, I still need your car keys." Jones gave his car keys to Quan.

When Quan was walking back to his car, he saw an expression on Dickey's face and turned around. Jones was pointing a revolver and a semi-automatic weapon at his head. Jones said, "I don't want to shoot you. . . . You look like a nice guy. . . . [¶] . . . [¶] You're my hostage. You have no idea how many people I've killed tonight."

Dickey jumped over the railing and disappeared. Quan took cover behind the white van. When Jones was distracted, Quan jumped over the center median wall and ran towards oncoming traffic until he encountered a California Highway Patrol (CHP) officer.

Michael Dickey testified he saw a sedan hit a truck at approximately 7:40 p.m. He moved over to avoid an accident and stopped on the side of the freeway. Quan said Jones was not completely coherent and smelled of alcohol. The next thing Dickey knew, Jones was standing there with two guns aimed at him and Quan. Jones was staggering and muttering. Dickey was on top of the embankment. Jones did not track him with the gun, and Dickey went down the side of the embankment. Dickey saw Jones lean over and

point a gun in his direction. He heard a gunshot. Afterwards, Dickey discovered that a bullet had gone through the center of his windshield, destroying his GPS device.

Law enforcement officers arrived. A CHP officer saw Jones leaning against a railing, pointing a handgun towards University Avenue. When the officer activated his spotlight, Jones set the handgun and another gun on the top of a concrete shoulder wall. Jones was obviously intoxicated. He had a strong breath odor of alcohol and was unsteady on his feet. His eyes were bloodshot and his speech was slow and slurred, but he was complying with commands.

The Defense Case

Forensic toxicologist Erin Crabtrey testified Jones's blood alcohol level (BAC) sample at 1:08 a.m. on March 14 was .24 percent. Five hours earlier, his BAC may have been .32 percent. Jones also had 32 nanograms per milliliter of alprazolam, also known as Xanax, in his blood sample. Therapeutic levels for alprazolam typically ranged from 5 to 50 nanograms per milliliter. According to Crabtrey, one of the side effects of alprazolam is blurred vision. In combination with alcohol, particularly at the level of Jones's BAC, alprazolam could cause blurred vision, tunnel vision and confusion.

John A. Budny, Ph.D., a toxicologist, testified that alprazolam at low doses adversely affects visual attention. Visual attention is the process of seeing something and cognitively registering what the individual thought he saw. At higher doses, alprazolam causes impairment of visual attention and psychomotor skills. Taking alcohol and alprazolam together reinforces the effects of each individual drug on the nervous system.

Jones testified he was heavy drinker and struggled to stop drinking. His doctor had prescribed alprazolam for alcohol withdrawal symptoms. Jones was drinking throughout the day on March 13.

Jones said there was a lot he did not remember about that day. Jones remembered putting his hands around Brown's neck, but said he did so in a joking manner. When Brown asked him to stop, he did. Jones did not remember hitting her. Brown's daughters said Conley had followed them to the ice cream store and back. They were afraid of him. Jones suspected Conley was stalking the children and decided to confront him. He was upset and took some alprazolam. Jones did not remember going to his car. When Jones confronted Conley, Conley charged at him, trying to get the gun. Jones panicked and shot Conley. He then ran downstairs looking for someone to telephone 911.

Jones saw Weatherby, whom he had never met, and started to say, "Hey, call 911." Jones said he saw a man pointing what appeared to be a black weapon at him. One of Weatherby's eyes was closed, and he was squinting the other eye. Jones shot Weatherby because he thought he had a gun. He testified he aimed for center mass because he "definitely wanted to put a bullet into him before he put a bullet into me."

Jones felt morally responsible for Weatherby's death. Jones said he was surprised to learn that Weatherby had been shot in the back. That was not something he could reconcile in his mind. After shooting Weatherby, the next thing Jones remembered was being on the freeway, pointing two guns at someone. He did not recall shooting the gun while on the freeway.

During Jones's cross-examination, the prosecution played several tapes of Jones in police custody. Jones said he had no memory of the recorded conversations. Defense counsel asked the trial court to redact the word "faggot" from a recording in which Jones was complaining about a bruise he received on his thigh when taken into police custody. Defense counsel argued the word was far more prejudicial than probative. The trial court denied the request. The recording was played in its entirety for the jury. The relevant portion is excerpted here.

"Man 1: Really? Hey, what are you doing?"

"Jones: Don't look, faggot.

"Man 1: Pull your pants back up.

"Jones: Dude, look at that.

"Man 2: Yeah, you got a bruise what happened.

"Jones: That's what I'm talking about.

"Man 2: Well, what . . .

"Jones: I didn't fucking go on a rampage for nothing.

"Man 2: (Unintelligible) shit, it's hard to pull your pants up with one hand.

"Jones: Sorry you had to see that, man. Did you see that bruise? That's some nasty-ass shit.

"Man 2: (Unintelligible).

"Jones: I didn't fucking go on a rampage for nothing."

The prosecution also played a recording of a conversation between Jones and his wife in which Jones remained silent for approximately nine or 10 seconds after his wife

asked him, "Why is it that [the police] are telling me that you killed somebody tonight and you're saying you didn't?" Jones did not immediately respond. He then said the police were confused and he did not know why they were saying that.

The Trial Court's Rulings on Defense Motions

After the close of evidence, the defense asked the trial court to include an instruction on self-defense, which would allow the jury to acquit Jones of murder. Counsel argued someone holding a cell phone in the manner described by the defendant could justify self-defense. For example, there were a number of incidents in which a police officer had shot a person because he believed the person was holding a gun when in fact it was a cell phone.

The trial court denied the defense's request to allow the jury to consider a claim the defendant was acting in self-defense when he shot and killed Weatherby. The trial court said, "I'm willing to go with you on the unreasonable self-defense, but I'm not [going to allow a claim of self-defense] -- you've made your record, and again, if the Courts of Appeal sit there and say that you can get yourself so drunk that you now cannot perceive reality, and you're going to be allowed to benefit from that misperceiving of reality, that's fine."

The defense asked the trial court to allow the jury to consider Jones's voluntary intoxication in determining whether he had had an honest, but unreasonable, belief that Weatherby had a gun. The defense asked the trial court to strike the sentence: "You may not consider evidence of voluntary intoxication for other purpose" from the instruction

limiting consideration of voluntary intoxication to whether the defendant acted with an intent to kill or the defendant acted with premeditation and deliberation.

The prosecution objected, arguing this sentence was included to preclude voluntary intoxication from negating crimes. The jury could only consider voluntary intoxication in determining whether the defendant had acted with premeditation, deliberation or the specific intent to kill.

Describing its ruling as "kind of weaselly," the trial court denied the defense's request to instruct the jury that it could consider evidence of Jones's voluntary intoxication in assessing his claim of unreasonable self-defense. However, the trial court said it would allow the defense to argue to the jury the evidence showed that voluntary intoxication contributed to Jones's actions, resulting in unreasonable self-defense. In remarks to counsel, the trial court stated, "[T]he shooting at a relatively close range by a person experienced in firearms of a man legally blind, shot in the back while on his phone to 911 calling for assistance for another person who's been shot, to me, that version of those events is the equivalent of a total delusion. No different than him, because he gets so drunk, thinking he's being attacked by a tiger." The trial court explained if Jones's voluntary intoxication creates a delusion that is unconnected with reality, it cannot be used to establish unreasonable self-defense.

Closing Argument

The prosecution asked the jury to return a verdict of first degree murder, arguing that Jones acted with express and implied malice when he shot Weatherby in the back and left the scene. The prosecution told the jury the excuse of voluntary intoxication

could not be used to reduce a first degree murder charge to voluntary manslaughter. The evidence showed when Jones left Conley's apartment, he saw Weatherby talking on his cell phone and decided to kill him. There was no justification for self-defense because Weatherby had his back to Jones at the time he was killed. The physical evidence showed it was impossible for Jones to have actually believed he was in imminent danger of being killed or severely injured when he saw Weatherby.

The defense argued the focus was on what Jones actually thought when he shot Weatherby, not on what a reasonable person would have thought. There was no evidence to show Weatherby had his back to Jones when Jones first saw him. In the very short time in which Jones pulled out his gun, took aim and fired, Weatherby turned to go back into his apartment. The defense asked the jury to keep in mind that at the time of the shooting Jones had a BAC of .32, which was exacerbated by alprazolam. The law allowed the jury to distinguish between a person who made a mistake, including an unreasonable mistake, and a person who acted with malice. The defense argued Jones made an unreasonable mistake and asked the jury to return a verdict of voluntary manslaughter.

DISCUSSION

I

Overview of Legal Principles of Murder, Manslaughter and Reasonable and Unreasonable Self-Defense

Murder is the unlawful killing of a human being with malice aforethought. (§ 187.) "A killing with express malice formed willfully, deliberately, and with

premeditation constitutes first degree murder." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) "Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

"Manslaughter, a lesser included offense of murder, is unlawful killing without malice." (*Elmore, supra,* 59 Cal.4th at p. 133.) Voluntary manslaughter is a type of manslaughter. "Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion and unreasonable self-defense." (*Ibid.*)

"Self-defense, when based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime. [Citations.] A killing committed when that belief is *unreasonable* is not justifiable. Nevertheless, 'one who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.' " (*Elmore, supra*, 59 Cal.4th at pp. 133-134.) The doctrine of unreasonable self-defense is not available when the belief in the need to defend oneself is entirely delusional. (*Id*. at p. 130.)

II

Self-Defense

A

Claims on Appeal

Citing *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885, Jones asserts his testimony constitutes substantial evidence to allow the issue of self-defense to go to the jury. (*Ibid*. [testimony of a single witness is sufficient for the proof of any fact].) He argues the trial court erred in finding that he was intoxicated to the point of delusion, which is a factual determination for the jury. Jones contends the trial court's finding that he was delusional and refusal to allow the jury to consider his self-defense claim violates his constitutional rights to due process under the Sixth and Fourteenth Amendments to the United States Constitution.

The People contend there is no substantial evidence to support an instruction on self-defense. The People also argue that error, if any, is harmless because the jury rejected the Jones's claim of unreasonable self-defense and therefore would not have accepted his claim of self-defense.

B

Applicable Legal Principles

Homicide is justifiable when committed in self-defense. (§ 197, subd. 1.) A defendant acts in lawful self-defense where he reasonably believes that he was in imminent danger of suffering bodily injury and that the immediate use of force was necessary to defend against that danger, and the defendant used no more force than was reasonably necessary to defend against that danger. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49-50, citing CALCRIM No. 3470.)

Conversely, self-defense may not be invoked by a defendant who, through his own wrongful conduct, has created circumstances under which his adversary's attack or

pursuit is legally justified. (*People v. Valencia* (2008) 43 Cal.4th 268, 288; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 (*Christian S.*).) A danger which the defendant has voluntarily brought upon himself by his own misconduct is not sufficient to support a reasonable apprehension of imminent danger. (*People v. Holt* (1944) 25 Cal.2d 59, 65-66.)

"A trial court has no duty to instruct the jury on a defense — even at the defendant's request — unless the defense is supported by substantial evidence." (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Upon review, we " 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (Cf. *People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*).)

In determining whether there is substantial evidence, the reviewing court does not limit its review to the evidence favorable to the respondent. (*Johnson*, *supra*, 26 Cal.3d at p. 577.) We resolve the issue in view of the entire record before the jury and do not " 'limit our appraisal to isolated bits of evidence selected by the respondent.' " (*Ibid.*) We then determine whether the evidence of each of the essential elements is *substantial*. " '[I]t is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' " (*Ibid.*, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138, fn. omitted.) A trial court's refusal to instruct on self-defense will be upheld on appeal where the record contains no substantial evidence to support the instructions. (*People v. Rodriguez*

(1997) 53 Cal.App.4th 1250, 1270; *People v. De Leon* (1992) 10 Cal.App.4th 815, 824–825.)

C

Analysis

The trial court properly refused to instruct the jury on Jones's claim of self-defense. A claim of self-defense is not available to a defendant who created circumstances that placed other persons at risk of death or serious bodily injury. (*Christian S., supra,* 7 Cal.4th at p. 773, fn. 1; *People v. Holt, supra,* 25 Cal.2d at pp. 65-66.) Here, Jones brought any danger upon himself by shooting Conley, one of Weatherby's neighbors, and then walking through the apartment complex, armed and intoxicated.

Jones argues his belief that Weatherby had a gun and that his own life was in danger constitutes substantial evidence to justify instructing the jury on self-defense. We disagree. In a review for substantial evidence, we do not limit our inquiry to " 'isolated bits of evidence.' " (*Johnson, supra,* 26 Cal.3d at p. 577.) Here, Jones twice described his own actions as "a rampage." For no apparent reason, Jones retrieved a weapon from his car, walked back upstairs, deliberately shot a stranger in the leg, and calmly walked downstairs. Instead of leaving the premises, Jones turned back into the building. He shot and killed the first person he encountered. The evidence shows that Jones did not take any evasive action as he passed Weatherby. Instead, he assumed a shooting stance and aimed his gun at Weatherby's front door. Jones waited approximately five seconds and then fired, hitting Weatherby in his back. Weatherby was talking to dispatch when Jones

shot him. It would have been apparent to a reasonable person that Weatherby was talking on a cell phone, not on a gun. Weatherby was inside his own home when he was shot and killed. In view of the other evidence, Jones's testimony about his *admittedly impaired memory* of the events of March 13, 2013, does not constitute substantial evidence to support a claim of self-defense.

The parties' arguments concerning the trial court's comments about Jones being intoxicated to the point of delusion are of no import here. Whether sober, intoxicated or delusional, under this set of facts, Jones was not entitled to assert a claim of self-defense. Jones created a situation in which he placed other people's lives at risk. Even if Weatherby had a gun, which he did not, Jones would not have been entitled to claim self-defense. (*Christian S., supra*, 7 Cal.4th at p. 773, fn. 1 [a fleeing felon who kills a pursuing police officer cannot claim self-defense even if his belief in imminent harm was reasonable].) The trial court's refusal to allow the jury to consider the claim that Jones acted in self-defense when he shot a nearly blind man in the back, killing him in his own apartment, did not violate Jones's constitutional rights to due process. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 87 [a court need not instruct the jury on defenses not supported by the evidence].)

III

Evidence of Voluntary Intoxication to Negate Malice

A

The Parties' Contentions on Appeal

Jones contends the trial court violated his right to due process by not allowing the jury to consider his voluntary intoxication in determining whether he had an honest but unreasonable belief that Weatherby's cell phone was a gun and his own life was in imminent danger. He argues *Elmore* supports his position that an intoxicated person can make a factual mistake. He states the cell phone is an objective correlate that shows his belief was not based purely on delusion. Jones asserts a defendant who mistakenly believes the actual circumstances required the defensive act may argue that he is guilty only of voluntary manslaughter, even if his reaction was distorted by voluntary intoxication. Jones maintains the error is a prejudicial denial of due process because the defective instruction relieved the prosecution from its burden of establishing malice aforethought.

The People argue unreasonable self-defense is not an affirmative defense but a description of one type of voluntary manslaughter. As such, the trial court correctly denied Jones's request to modify the instruction under section 29.4. The People argue any error was harmless because the trial court permitted the defense to put on evidence about the effect of voluntary intoxication on a person's perception, and instructed the jury in considering unreasonable self-defense to "consider all of the circumstances as they were known and appeared to the defendant." The People contend in view of the evidence

describing Jones's actions, including fleeing the scene of Weatherby's killing, telling a motorist he had killed a number of people, and announcing to police officers that he had gone on a rampage, there is no reasonable probability that any instructional error affected the result of the verdict.[6]

B

Applicable Legal Principles and Standard of Review

"Murder is the unlawful killing of a human being . . .with malice aforethought." (§ 187.) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

A defendant who acts with the state of mind required for imperfect self-defense does not harbor express malice. (*Elmore, supra,* 59 Cal.4th at p. 134.) " 'Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter:

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6 After the cases were briefed, we asked the parties to discuss the applicability, if any, of two recently published cases, *People v. Ocegueda* (2016) 247 Cal.App.4th 1393 (*Ocegueda*) and *People v. Soto* (2016) 248 Cal.App.4th 884 (*Soto*), review granted October 12, 2016, S236164. In *Soto*, the reviewing court held that because a defendant's honest, but unreasonable, belief in the need for self-defense negates express malice, evidence of the effect of voluntary intoxication on the defendant's state of mind is relevant to a claim of unreasonable self-defense. Therefore, the trial court erred when it did not instruct the jury that it could consider evidence of voluntary intoxication with respect to his claim of unreasonable self-defense. (*Soto*, at p. 900.) *Ocegueda* concerns the same issue with respect to mental impairment. The reviewing court held that the trial court erred in not instructing the jury it could consider mental impairment in determining whether the defendant acted with malice. (*Ocegueda, supra,* 247 Cal.App.4th at p. 1407.) The California Supreme Court granted review in *Soto* on whether there was instructional error and whether the error was prejudicial.

heat of passion and unreasonable self-defense.' " (*Id.* at p. 133.) A person who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter. (*Id.* at p. 134.)

Section 29.4 states: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."

The de novo standard of review applies in assessing whether instructions correctly state the law and whether the instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

C

Additional Factual Background

The court denied the defense motion to allow the jury to consider evidence of the defendant's voluntary intoxication in determining whether he had an honest, but unreasonable, belief that Weatherby had a gun. The court instructed the jury on first

degree murder and first or second degree murder with malice aforethought. The court also gave the following instructions to the jury:[7]

CALCRIM No. 571: A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in unreasonable self-defense. The defendant acted in unreasonable self-defense if the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury, and the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, but at least one of those beliefs was unreasonable.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in unreasonable self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.

CALCRIM No. 625: You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider the evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with premeditation and deliberation. A person is voluntarily intoxicated if he becomes intoxicated by willfully using any intoxicating drug, drink, or other substances, knowing that it can produce an intoxicating effect or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose.

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7 For convenience, we have edited the format of the jury instructions and omitted some material that is not relevant to the issues on appeal.

D

Analysis

The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, we look first to the language of the statute, giving effect to its plain meaning. "Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

Section 29.4, subdivision (b), states: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." By its plain terms, section 29.4 makes evidence of voluntary intoxication admissible on the issue of whether a defendant on trial for murder harbored *express* malice. However, voluntary intoxication in not admissible to negate *implied* malice. (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1298.)

Here, the prosecution argued Jones acted with both express and implied malice in shooting Weatherby. The jury instructions stated the jury may consider evidence of the defendant's voluntary intoxication only in deciding whether the defendant acted with an intent to kill or acted with premeditation and deliberation. The jury was further instructed: "You may not consider evidence of voluntary intoxication for any other purpose." The jury instructions did not inform the jury it may consider evidence of

voluntary intoxication in deciding whether the defendant "harbored express malice aforethought." (§ 29.4, subd. (b).)

"Generally, the intent to unlawfully kill constitutes malice." (*People v. Breverman* (1998) 19 Cal.4th 142, 153 (*Breverman*).) However, "[a] defendant who acts with the state of mind required for imperfect self-defense does not harbor express malice." (*Ocegueda, supra,* 247 Cal.App.4th at p. 1407.) Unreasonable self-defense may preclude the formation of malice and reduce murder to voluntary manslaughter. (*Elmore, supra,* 59 Cal.4th at p. 133.) Taking these principles together, a jury may consider voluntary intoxication in deciding whether the defendant had an actual but unreasonable belief in the need for self-defense. (Cf. *Ocegueda, supra,* 247 Cal.App.4th at p. 1407.) Thus, because imperfect self-defense negates express malice, and evidence of voluntary intoxication is admissible under section 29.4, subdivision (b) as to a finding of express malice, the instruction limiting consideration of voluntary intoxication to "intent to kill or premeditation and deliberation" was erroneous.

E

The Error Was Not Prejudicial

Where an instructional error is an error of California law alone, it is subject to the state standards of reversability under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Breverman, supra,* 19 Cal.4th at p. 165.) *Watson* holds that a miscarriage of justice should be declared only when the reviewing court concludes it is reasonably probable that a result more favorable to the appellant would have been reached in the absence of error. (*Watson,* at p. 836.) This standard "focuses not on what a reasonable

jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, at p. 177.)

However, an "instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element" is subject to review under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Flood* (1998) 18 Cal.4th 470, 502-503 (*Flood*).) The harmless error analysis under *Chapman* "is 'whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " (*Flood*, at p. 494.)

In their briefing, the parties did not explicitly argue whether the *Watson* or *Chapman* harmless error analysis applies. However, at oral argument, Jones contended the appropriate standard of review is under *Chapman*. The People disagreed. We therefore consider the appropriate standard of harmless error review.

In his briefing, Jones argues the erroneous jury instruction relieved the prosecution from its burden of establishing malice aforethought, thereby omitting an element of the offense resulting in a due process violation. If this were the case, *Chapman* would apply.

The People respond the jury instructions, as a whole, did not preclude the jury from concluding that Jones had an honest, but unreasonable, belief in the need for self-

defense. The jury was informed to consider all the circumstances as they were known and appeared to the defendant. Therefore, the instructions did not preclude the jury from considering Jones's argument he was guilty only of manslaughter. If this were the case, *Watson* would apply.

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on other grounds by *People v. Reyes* (1998) 19 Cal.4th 743.) The trial court instructed the jury on the law concerning first degree murder, second degree murder, manslaughter, malice and limitations on the use of voluntary intoxication. The trial court also instructed the jury to consider "circumstances as they were known and appeared" to the defendant.

The court allowed the defense to present evidence about the combined effect of alcohol and alprazolam on visual perception and psychomotor coordination, and to argue that Jones honestly, but unreasonably, believed he needed to act to protect himself from imminent harm. In closing, the prosecutor told the jury it could not use evidence of voluntary intoxication to reduce first degree murder to manslaughter, only to second degree murder. The defense argued Jones unreasonably believed Weatherby's cell phone was a gun and asked the jury to return a verdict of voluntary manslaughter. The jury did not ask for clarification.

Because the record shows that the jury instructions did not preclude the jury from considering a verdict of manslaughter on the theory Jones honestly, but unreasonably,

believed Weatherby's cell phone was a gun and therefore lacked the required mental state required to convict him of murder, we conclude that the instructional error did not constitute a due process violation. In view of the totality of the instructions given, the jury was able to consider Jones's testimony he believed he was in fear of his life and the circumstances as they were known and appeared to him. We therefore evaluate whether the instructional error was harmless under *Watson*.

We conclude that "the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman, supra*, 19 Cal.4th at p. 177.) The sole evidence supporting Jones's claim of unreasonable self-defense consisted of his own testimony. The defense presented no evidence to corroborate his version of events. Witnesses who observed the shooting testified that Jones appeared to be very focused and was aiming a gun at Weatherby's front door. Jones never tried to duck or lean over. He was holding a gun in both hands, with his arms extended. Jones waited approximately five seconds and then fired the gun. Weatherby was shot in the back, which indicates that he had turned and retreated into his apartment before Jones fired his weapon. Jones then fled the scene. At the site of his car accident, he held two men at gunpoint and said, "[Y]ou have no idea how many people I've killed tonight." After he was detained, instead of claiming he shot Weatherby in self-defense, Jones twice told police he "didn't fucking go on a rampage for nothing."

It is therefore not reasonably likely the jury would have credited Jones's claims of self-defense while rejecting the prosecution's evidence to the contrary. Absent Jones's self-serving testimony, the defense presented no evidence to support a theory of self-defense. The claim of unreasonable self-defense did not turn on whether the defendant was sober or intoxicated. Thus, even if the jury explicitly had been allowed to consider evidence of defendant's voluntary intoxication in assessing his state of mind for unreasonable self-defense, it is not reasonably probable the jury would have reached an outcome more favorable to him. (*Watson, supra*, 46 Cal.2d at p. 836.) The evidence that Jones honestly believed that he was acting in self-defense when he shot Weatherby in the back is extremely weak in comparison to the evidence he was on a rampage and deliberately shot Weatherby after deliberately shooting Conley. We therefore conclude Jones was not prejudiced by the instructional error. (See *Watson, supra*, 46 Cal.2d at p. 836; *Breverman, supra*, 19 Cal.4th at p. 177.)

IV

The Adoptive Admission Instruction Did Not Prejudice the Defendant

Jones contends the court prejudicially erred in instructing the jury on adoptive admissions, and the instruction to the jury that it could consider his silence during a conversation with his wife constituted *Doyle* error. Jones argues the error was prejudicial because the jury would have understood the word "killed" to mean "murder."

A

Additional Factual Background

The prosecution played a recording of a conversation between Jones and his wife in which Jones remained silent for approximately 10 seconds after his wife asked him, "Why is it that [the police] are telling me that you killed somebody tonight and you're saying you didn't?" After not responding for nine or 10 seconds, Jones said, "They are — they are very mixed up and very fucking confused. I don't know why they're saying what they're saying but . . ." at which point his wife responded, "Okay."

After the close of evidence, the prosecutor asked the court to give an adoptive admission instruction to the jury, incorrectly quoting Jones's wife as saying, "Daniel, you've been charged with murder. They said you killed somebody tonight." The prosecutor told the court "then there's literally a 10- to 15-second pause where he doesn't respond to her. And then she says, "Oh, okay. All right."

The defense objected to the instruction, pointing out Jones denied killing anyone multiple times during the conversation with his wife, police officers were present, and he had been given *Miranda* warnings. The defense did not correct the prosecutor's

misstatement of the exchange between Jones and his wife, or remind the trial court that Jones had responded to his wife's question, saying he did not know why the police were saying he killed someone.

The court said it would be complicated for the jury to determine whether the statement was an adoptive admission in view of the defendant's lack of sobriety and the presence of police officers, but granted the prosecutor's request. The trial court instructed the jury: "If you conclude that someone made a statement outside of court that tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following was true: 1. The statement was made to the defendant or made in his presence; 2. The defendant heard and understood the statement; 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; and 4. The defendant could have denied it but did not. If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

In her closing argument, the prosecutor did not refer to the conversation between Jones and his wife. During deliberations, the jury asked to rehear the recording of Jones's conversation with his wife.

B

Legal Principles

"If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*People v. Preston* (1973) 9 Cal.3d 308, 313-314 (*Preston*); *People v. Jennings* (2010) 50 Cal.4th 616, 661.)

Errors in jury instructions are questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

C

Analysis

Jones argues the trial court erred in allowing the jury to determine whether his silence was an adoptive admission. He asserts his wife's statement was not a question, there was no fair opportunity to respond to the statement in the presence of police officers, and the circumstances of his wife's question did not normally call for a response. Jones bases his arguments on the actual statement his wife made. However, the court, in issuing its ruling, was not informed of the actual statement. Instead, the prosecutor misrepresented the statement, inserting the word "murder." Jones did not correct the misstatement or object on those grounds at the time.

In view of the information before the court at the time of its ruling and defense counsel's failure to correct the record, we need not consider the argument the actual statement did not merit an adoptive admissions instruction. Jones's failure to object on the ground the prosecutor misstated the evidence prevented the court from considering the arguments Jones now makes on appeal. (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489 [party may not assert theories on appeal which were not raised in the trial court].) With respect to the constitutional implication of the jury's review of the actual statement and consideration of the adoptive admission instruction, we are not persuaded the adoptive admission instruction violated Jones's right to due process.

In California, under *Doyle* and *People v. Coffman and Marlow* (2004) 34 Cal.4th 1 (*Coffman*), the prosecution may not present testimony about a defendant's silence after receiving *Miranda* warnings without violating the Due Process Clause of the Fourteenth Amendment. (*Doyle, supra*, 426 U.S. at p. 619; *Coffman*, at pp. 118-119.) However, *Doyle* does not apply to a voluntary conversation with a private party unless the evidence demonstrates the defendant's silence results primarily from the conscious exercise of his constitutional rights. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1556 (*Hollinquest*).)

Here, the circumstances of Jones's conversation with his wife do not support the inference he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution. (*Preston, supra*, 9 Cal.3d at pp. 313-314.) Prior to the statement at issue, Jones's wife told him the police were saying he killed someone. Jones denied it. She asked again, "You didn't kill somebody tonight?" Jones responded, "No."

Later, when she asked Jones, "Why is it that they are telling me that you killed somebody tonight and you're saying you didn't?" Jones did not indicate he was unable to respond or refer to the presence of police officers. Instead, after pausing for approximately 10 seconds, he said he did not know. Jones's wife asked him a compound question. Jones was intoxicated. Thus, we are not persuaded Jones's silence during a brief portion of his voluntary conversation with his wife resulted from the conscious exercise of his constitutional rights. (*Hollinquest, supra*, 190 Cal.App.4th at p. 1556.)

Even if the instruction was given in error or Jones intended to assert his constitutional rights during his voluntary conversation with his wife, Jones cannot show prejudice. There is overwhelming evidence to show Jones killed Weatherby. Jones *testified* he shot and killed Weatherby, and felt morally responsible for his death. Weatherby described a person fitting Jones's description as the shooter, and other witnesses who had witnessed some or all of the incident identified Jones at trial. The wife's question referred only to "killing," and was not relevant to the question of self-defense. Thus, any instructional or constitutional error is harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-61.)

VI

The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Request for Redaction

The court denied the defense's request to redact the word "faggot" from a recording that was played to the jury. When in police custody, Jones said, "don't look,

faggot" as he pulled down his pants to examine a bruise on his thigh. Jones contends the court did not weigh the probative value of the word "faggot" against its prejudicial effect, and thus abused its discretion under Evidence Code section 352.

The record shows, in response to Jones's request for redaction, the court said, "Well, you take your clients as you find them. They choose to make those statements. That's part of the entire conversation. He's testifying he doesn't remember the conversations. There's some question in my mind if he's being honest or not about this whole thing and he's being very selective, and then you want me to go through and edit out individual words that your client had used in a statement. That just seems unreasonable to me."

The court's statement allows the reasonable inference the court viewed Jones's statement, including the language that he used, as relevant to Jones's credibility. In addition, Jones's language was relevant to the prosecution's claim that Jones became volatile and aggressive without provocation. As such, the court could determine the statement had some probative value and the word "faggot" would not be prejudicial in view of the overwhelming evidence showing that Jones shot Weatherby in the back in his own apartment. We conclude that admitting the word "faggot" in evidence did not result in a miscarriage of justice requiring reversal. (See Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b).)

DISPOSITION

We affirm the judgment.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.